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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2007-023144 07/28/2008

JUDGE DOUGLAS L. RAYES

CLERK OF THE COURT
T. Tankersley
Deputy

BASHAS INC

MICHAEL C MANNING

v.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, et al.

FRANK VERDERAME

ELIZABETH A LAWRENCE
STANLEY LUBIN
STEPHEN W TULLY

MINUTE ENTRY RULING

The Court has considered Motions to Dismiss brought by Defendants United Food and Commercial Workers International Union, United Food and Commercial Workers Local 99, Trina Zelle, Phillip Reller, Hector Yturralde and Gloria E. Yturralde, the Gutierrez Defendants, Hungry for Respect Coalition, James McLaughlin, "Jane Doe McLaughlin", William T. McDonough, Susan McDonough, National Farm Workers Service Center, Inc., Michael Nowakowski, Delia Nowakowski, Plaintiff's Responses to said Motions and Defendants' respective Replies. The Court has also considered the Motion of Defendants United Food and Commercial Workers International Union, United Food & Commercial Workers 99, Trina Zelle, Phillip Reller, Hector Yturralde and Gloria E. Yturralde and the Motion of Defendants James McLaughlin, "Jane Doe McLaughlin", William T. McDonough and Susan McDonough for Remedies under ARS § 12-751 and 752 and for Findings of Fact, Plaintiff's Responses to said Motions and the Defendants Replies. The Court has considered the arguments of counsel.

I. Motion by Defendants United Food and Commercial Workers International Union, United Food and Commercial Workers Local 99, Trina Zelle, Philip

Reller, Hector Yturralde and Gloria E. Yturralde to Dismiss First Amended Complaint.

A. Ariz. R. Civ. P. (12)(b)(1)

Defendants United Food and Commercial Workers International Union, United Food and Commercial Workers Local 99, Trina Zelle, Philip Reller, Hector Yturralde and Gloria E. Yturralde (collectively, "UFCW") argue that the Complaint should be dismissed because Bashas' claims are preempted by the National Labor Relations Act ("NLRA"). Bashas argues that although the NLRA governs some aspects of disputes between unions and employers, the NLRA does not govern these claims.

"Congress passed the NLRA in an effort to achieve uniform and effective enforcement of a national labor policy." *Chavez v. Copper State Rubber of Arizona*, 182 Ariz. 423, 427, 897 P.2d 725, 729 (App. 1995). When the particular activity regulated by the state is protected by Section 7 of the NLRA or constitutes an unfair labor practice under Section 8, state jurisdiction must yield. See *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 79 S.Ct. 773, 779 (1959). When the conduct at issue is arguably protected or prohibited, the NLRB, not the state court, determines whether the conduct falls within the NLRB's jurisdiction. See id. at 244-45, 79 S.Ct. 779. When the activity regulated is merely a peripheral concern of the NLRA, or where the regulated conduct touches interests so deeply rooted in local feeling and responsibility, in the absence of compelling congressional direction, the Court cannot infer the Congress has deprived the states of the power to act. See *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 59, 86 S.Ct. 657, 661 (1966).

"The critical inquiry in these situations is whether the conduct at issue in the state cause of action is identical to that which could be presented to the NLRB." *Chavez*, 182 Ariz. at 428. If the conduct relied on to prove a crucial element in the state action is conduct that is arguably covered by the NLRB, then the state claim is preempted. *See id*. at 428-29. Bashas claims against UFCW are as follows:

1. Intentional Interference with Business Expectancy: Bashas' claim for intentional interference with business expectancy is grounded in its defamation allegations. Because Bashas' defamation allegations are not preempted by the NLRB (see #3 below), neither is this claim.

2. Aiding and Abetting Interference with Business Expectancy: Because Bashas' claim for intentional inference with business expectancy is not preempted, neither is the claim for aiding and abetting.

3. Defamation: In *Linn*, the Supreme Court ruled that in the context of a labor dispute, state claims for defamation are not preempted if the complainant can show that the defamatory statements were circulated with malice and caused damage. 383 U.S. at 64-65, 86 S.Ct. at 664. Bashas in this case has pled that the alleged defamatory statements were circulated with malice and that the statements caused Bashas damages. Therefore, the defamation claim is not preempted.

4. Injurious Falsehood: For the reasons stated with respect to Bashas' claims for defamation, the claim for injurious falsehoods is also not preempted.

5. Violation of A.R.S. § 13-2314.04: Bashas alleges a violation of Arizona's RICO statute based on the predicate offenses of extortion, asserting false claims, and a scheme or artifice to defraud. The predicate offenses do not involve actions that implicate the NLRB. Furthermore, to the extent that the predicate offenses involve the alleged defamatory statements, the claim would not be preempted because Bashas' claim for defamation is not preempted.

6. Conspiracy to violate A.R.S. § 13-2314.04: The claim for conspiracy to violate the RICO statute is not preempted for the same reason Bashas' RICO claim for defamation is not preempted.

7. Trespass: In *Sears, Roebuck and Co. v. San Diego District Council of Carpenters*, 436 U.S. 180, 98 S.Ct. 1745 (1978), the Supreme Court held that the NLRB does not preempt a state trespass action against picketing. Accordingly, Bashas' claim for trespass is not preempted.

8. Tortious Inference with Contractual Relations: In this claim, Bashas alleges that UFCW caused Campesina to breach its contract to broadcast advertisements for Food City and its contract regarding Bashas' sponsorship of the Fiestas Patrias event in 2007. UFCW's alleged behavior is not an unfair labor practice under the NLRB. Therefore, the NLRB does not preempt this claim.

B. Ariz. R. Civ. P. (12)(b)(6)

UFCW additionally argues that the Complaint should be dismissed because each count fails to state a claim for which relief can be granted.

1. Intentional Interference with Business Expectancy: In this claim Bashas alleges that UFCW intentionally interfered with its business relationship with consumers in the state of Arizona. A prima facie case requires: (1) the existence of a valid business

expectancy, (2) knowledge of the expectancy on the part of the interferer, (3) intentional interference inducing or causing interference with the expectancy, (4) resultant damage to the party whose relationship has been disrupted, and (5) that the defendant acted improperly. See *Wells Fargo v. Arizona Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 493, 38 P.3d 12, 31 (2002). Bashas alleges improper actions that, in part, consist of speech. With respect to those allegations, the claim must meet the First Amendment's requirements for defamation actions. See *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057-58 (9th Cir. 1990). However, Bashas has also sufficiently pled this count based on the UFCW's alleged actions of placing expired food products on Bashas' shelves.

2. Aiding and Abetting Interference with Business Expectancy: As Bashas has adequately pled a cause of action for intentional interference with business expectancy, it has also sufficiently alleged aiding and abetting with respect to that claim.

3. Defamation: Arizona is a notice pleading state and has no heightened pleading requirement for defamation claims. When a labor dispute is involved, the plaintiff must allege that the defamatory statements were made with malice. See Linn, 383 U.S. at 64-65, 86 S.Ct. at 664. This means that the statements were made with knowledge of their falsity or reckless disregard for their truth or falsity. The plaintiff must also allege actual harm from the statements. See id.

UFCW argues that in order to assert a viable defamation claim, the allegations must identify the speaker, the language used in the statement, and exactly what about the statement is false. See *Fowler v. Taco Viva, Inc.* 646 F.Supp. 152, 157 (S.D.Fla. 1986)(stating that a slander claim must allege the identity of the speaker); *Asay v. Hallmark Cards, Inc.* 594 F.2d 692, 699 (8th Cir. 1979)(stating that "the use of In haec verba pleadings on defamation charges is favored in the federal courts because generally knowledge of the exact language used is necessary to form responsive pleadings"); *Few v. Liberty Mutual Ins. Co.*, 498 F. Supp.2d 441, 453 (D.N.H. 2007)(stating that plaintiff failed to specify how the alleged defamatory statement was false).

Bashas has alleged that UFCW made defamatory statements with respect to the sale of infant formula, in the June 2007, November 2007 and April 2008 Reports, and in flyers that the UFCW mailed to Maricopa County residents. Bashas alleges that the statements were false, the UFCW knew they were false and/or acted with reckless disregard to their truth or falsity, and that Bashas incurred actual damages as a result of the defamatory statements. These are sufficient allegations for a defamation claim.

Bashas also alleges that UFCW delivered defamatory pre-recorded messages to unknown numbers of Maricopa County residents. In its Response, Bashas admits that it does not know the content of those messages, but claims it was informed the messages were defamatory and included allegations of poor health and safety conditions at Bashas'

stores. The content of the pre-recorded messages has not been alleged and the claim must fail. Therefore, the defamation claim, to the extent that it is based on these messages does not state a claim.

4. Injurious Falsehood: Consistent with the discussion above, Bashas has adequately stated a claim for injurious falsehood.

5. Violation of A.R.S. § 13-2314.04: Bashas has sufficiently stated a RICO claim with a predicate offense of extortion. Pursuant to A.R.S. § 13-1804(A)(2), Bashas has alleged that UFCW has threatened to physically harm the public by placing expired food products on Bashas' shelves in order to obtain intangible property rights as well as money in the form of union membership dues.

6. Conspiracy to Violate A.R.S. §13-2314.04: Bashas has sufficiently alleged a claim for conspiracy to commit a RICO violation consistent with the discussion above.

7. Trespass: Bashas has alleged a claim for trespass. Whether Bashas revoked UFCW's right to enter its stores with its June 2007 letter is a factual question.

8. Tortious Interference with Contractual Relations: A prima facie case of tortuous interference with contractual relations requires: (1) the existence of a valid contractual relationship, (2) knowledge of the relationship of the part of the interferer, (3) intentional interference including or causing a breach, (4) resultant damage to the party whose relationship has been disrupted, and (5) that the defendant acted improperly. See *Wells Fargo*, 201 Ariz. at 493, 38 P.3d at 31. Bashas has pled all the required elements for this claim.

II. Gutierrez Defendants' Motion to Dismiss the Amended Complaint

A. Ariz. R. Civ. P. (12)(b)(1)

For the reasons set forth above, the claims against the Gutierrez Defendants (collectively "Gutierrez") are not preempted by the NLRA.

B. Ariz. R. Civ. P. (12)(b)(6)

For the reasons set forth above, the Complaint sufficiently sets forth the above referenced eight counts against Gutierrez.

II. Motion to Dismiss First Amended Complaint and to Quash Service by Defendant Hungry for Respect Coalition

Hungry for Respect Coalitions ("HFRC") argues that the Complaint should be dismissed because as an unincorporated association, it cannot sue or be sued.

> The well-established rule is that in the absence of an enabling or permissive statute or rule of practice, an unincorporated associations, society, or club cannot sue or be sued in the organization's own name. The reason is that such an association… in the absence of statutes recognizing it, has no legal entity distinct from that of its members.

Associated Students of University of Arizona v. Arizona Bd. of Regents, 120 Ariz. 100, 102, 584 P.2d 564,566 (App.1978). Therefore, Bashas cannot sue HFRC and the Complaint does not state a claim as against HFRC. Bashas asks that if the Court is inclined to dismiss HRFC based on its motion, that Bashas first be given the opportunity to amend the Complaint to bring its claims against HFRC pursuant to Ariz. R. Civ. P. 23.2 Bashas' motion to amend is granted. Bashas shall file its Second Amended Complaint by no later than **August 30, 2008**.

IV. Motion to Dismiss First Amended Complaint as to Defendants James McLaughlin, "Jane Doe" McLaughlin, William T. McDonough, and Susan McDonough

Defendants McLaughlin and McDonough argue that they are immune from liability pursuant to Section 301(b) of the Labor Management Relations Act, 29 U.S.C. § 185(b). See *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 247-48, 82 S.Ct. 1318, 1324 (1962)(holding that § 301(b) prevents individual union officers from being held liable for union wrongs). However, Bashas argues that this rule is inapplicable to claims that do not arise in a collective bargaining context. The court in *Peterson v. Kennedy* stated, "[i]t has long been recognized that union officers and employees are not individually liable to third parties for acts performed as representatives of the union *in the collective bargaining process*." 771 F.2d 1244, 1256 (9th Cir. 1985)(emphasis added). That court also noted, "[w]e have read *Atkinson* to preclude employees from maintaining a state tort claim against union officials *in conjunction with a section 310 breach of duty claim* against a union." Id. at 1257 (emphasis added). Because these claims do not arise in the context of a collective bargaining agreement, the Defendants are not immune from suit.

Officers or individual members of an unincorporated association are liable for acts which they individually commit or to which they contributed. See *Underwood v. Maloney*, 256 F.2d 334, 339 (3rd Cir. 1958). Similarly, individual officers, directors, shareholders, agents and employees are not liable for torts of a corporation unless they were directly involved in the tortuous act or the corporation is an alter ego. See *Standage v. Jaburg & Wilk*, 177 Ariz. 221,

229, 866 P.2d 889, 897 (App. 1993). Bashas has alleged that Defendants participated in, led, directed, and ratified the UFCW's tortious actions. Therefore, Bashas claims have been sufficiently pled against the Defendants.

V. National Farm Workers Service Center, Inc., Michael Nowakowski and Delia Nowakowski's Motion to Dismiss and Joinder in Co-Defendants'' Motion to Dismiss Plaintiff's Amended Complaint

A. Ariz. R. Civ. P. (12)(b)(1)

For the reasons set forth above, the claims against the National Farm Workers Service Center, Inc., Michael Nowakowski and Delia Nowakowski (collectively "NFWSC") are not preempted by the NLRA.

B. Ariz. R. Civ. P. (12)(b)(6)

For the reasons set forth above, the Complaint sufficiently sets forth the above-referenced eight counts against NFWS. NFWS also argues that the Nowakowskis are separately subject to dismissal because the Complaint does not offer facts to support the claims against them. The Nowakowskis assert that individual officers, directors, shareholders, agents and employees are not liable for torts of a corporation unless they were directly involved in the tortious act or the corporation is an alter ego. See *Standage*, 177 Ariz. at 229, 866 P.2d at 897. However, Bashas has alleged that Nowakowski knows, directs and controls the statements that are broadcast on Radio Campesina. Accordingly, the Nowakowskis are not subject to dismissal from the Complaint.

NFWSC also argues that the Complaint violates Ariz. R. Civ. P. 8 because it is neither short nor plain. While the Complaint is full of irrelevant information and unnecessary rhetoric, the Motion to Dismiss on that basis is denied.

VI. Motion of Defendants United Food and Commercial Workers International Union, United Food and Commercial Workers 99, Trina Zelle, Philip Reller, Hector Yturralde and Gloria E. Yturralde for Remedies under A.R.S. § 12-751 and 752 and for Findings of Fact

UFCW also moves to dismiss the Complaint based on A.R.S. § 12-751 and 752. They also move for findings of fact that the lawsuit was brought for an improper purpose, namely to deter UFCW from exercising its Constitutional rights. UFCW also asks for costs and attorneys' fees.

A.R.S. § 12-752 states that "[i]n any legal action that involves a party's exercise of the right of petition, the defending party may file a motion to dismiss the action under this section." A.R.S. § 12-751 further defines the "exercise of the right of petition" to mean:

> any written or oral statement that falls within the constitutional protection of free speech and that is made as part of an initiative, referendum or recall effort or that is all of the following:
>
> (a) Made before or submitted to a legislative or executive body or any other governmental proceeding.
>
> (b) Made in connection with an issue that is under consideration or review by a legislative or executive body or any other governmental proceeding.
>
> (c) Made for the purpose of influencing a governmental action, decision or result.

Bashas argues that UFCW's defamatory statements and wrongful conduct are not protected petitioning activities. In order for an activity to constitute "the exercise of the right of petition" the threshold requirement is that the written or oral statement fall within the constitutional protection of free speech. In the present case, based on the First Amended Complaint alone, UFCW's alleged defamatory statements do no meet this requirement as Bashas has properly pled a defamation claim against the UFCW. Accordingly, the motion to dismiss under this statute is denied.

VII. Motion of Defendants James McLaughlin, "Jane Doe" McLaughlin, William T. McDonough and Susan McDonough for Remedies under A.R.S. § 12-751 and 752 and for Findings of Fact

For the reasons set forth above, Defendants' motion to dismiss pursuant to A.R.S. § 12-751 and 752 is denied.

Based on the foregoing,

IT IS ORDERED:

1) Granting HFRC's Motion to Dismiss but giving leave to Bashas to file a Second Amended Complaint pursuant to Rule 23.2 by no later than August 30, 2008.

2) Granting the Motion to Dismiss as to the Defamation Claim to the extent that it is based on the allegation that the UFCW delivered defamatory pre-recorded messages to unknown numbers of Maricopa County residents.

3) Denying Defendants' Motions to Dismiss in all other respects.

4) Denying Gutierrez Defendants' Motion to Strike.